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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1988

RITA M. SKELTON,

Petitioner,

vs.

ACTION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

May an employee who has established a *prima facie* case of age discrimination defeat summary judgment by showing evidence the employer's proffered reason for its action is unworthy of credence, or must the employee also present affirmative proof the employer's real criterion was age?

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No.

In The

Supreme Court of the United States

October Term, 1988

RITA M. SKELTON,

Petitioner,

vs.

ACTION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Rita M. Skelton respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered on May 12, 1988.

OPINIONS BELOW

The orders of the Court of Appeals are unreported. The order

sought to be reviewed appears in the appendix at 1a. The orders denying rehearing and rehearing *en banc* appear in the appendix at 32a-33a and 34a-35a, respectively.

The District Court's opinion, reported at 668 F. Supp. 25 (D.D.C. 1987), appears in the appendix at 3a-30a.

STATEMENT OF JURISDICTION

The order sought to be reviewed is dated May 12, 1988 and was entered that day. Rehearing and rehearing *en banc* were denied August 12, 1988. By order dated November 1, 1988, the Chief Justice of the United States extended until November 30, 1988 the time for filing a petition for a writ of certiorari.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621, *et seq.*, states, in pertinent part:

> (a) All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in executive agencies . . . shall be made free from any discrimination based on age . . . .
>
> (c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the Act.

29 U.S.C. § 633a.

STATEMENT OF THE CASE

Material Facts

This case concerns the agency's rejection of Ms. Skelton in 1985 for the position of Maryland State Program Director. Ms. Skelton, who then was fifty-seven years old, has served the agency for many years, and twice served successfully in State Program Director positions, in Ohio and Alabama. The agency rejected Ms. Skelton in favor of Mr. Yates, a thirty-eight-year-old man who never before had served as a State Program Director.

In its interrogatory answers, the agency swore Mr. Yates had been selected over Ms. Skelton because of his "strong interpersonal skills and . . . ability to deal with all segments of the community." [Answer to Interrogatory 1(b)(1)(ii)]. The interrogatory answers were signed by Mr. Bonner, the agency official who selected Mr. Yates. In his deposition, Mr. Bonner confirmed this reason, repeatedly rejecting invitations to modify his interrogatory response (Bonner Depo. 56, 58, 90-91).

Despite his insistence on this proffered reason, Mr. Bonner had to admit that Ms. Skelton had "extensive" experience in volunteer activities, the focus of the agency's programs, and that her experience "cover[ed] the gamut of those things that would be expected of . . . a state director." *Id.* 89. Further, as of the close of discovery, nothing in the record supported Mr. Bonner's assertion that Mr. Yates had experience with "all segments of the community" involved in agency volunteer activities. Nothing in Mr. Yates' SF 171 (statement of qualifications), his supervisors' evaluations of him, or his deposition testimony, supported Mr. Bonner's assertion.

Faced with this pre-trial record, the agency changed position. Abandoning its previous explanation, the agency in its summary

judgment motion asserted that Mr. Yates' "outstanding appraisals" were the reason for his selection over Ms. Skelton. The agency so claimed, despite Mr. Bonner's deposition testimony that he had "scant recollection" of having seen these appraisals (Bonner Depo. 81-82).

Ms. Skelton requested a trial. Given the agency's self-contradiction, under the circumstances described above, she maintained the agency's reason for selecting Mr. Yates was genuinely in dispute. She argued this contradiction, and trial cross-examination of Mr. Bonner allowing the court to assess his demeanor, would convince the judge the agency had failed to present a credible response to Ms. Skelton's *prima facie* case of discrimination.

Decisions Below

The District Court,[1] however, deemed the agency's credibility irrelevant. Relying solely on other district court decisions, the District Court held "even if a plaintiff were successful in discrediting the defendant's reason for selecting another, younger candidate, . . . it does not follow that the plaintiff will have defeated the defendant's motion [for summary judgment]." (App. 21a). *Quoting Snyder v. Washington Hospital Center,* 36 Fair Empl. Prac. Cas. (BNA), 445, 448 (D.D.C. 1984), the District Court stated:

> [E]vidence that the reasons given by an employer for an employment decision were not the "real" ones does not prove age discrimination; rather, it only proves that some other reason motivated the employer. Absent some evidence that the real

1. The District Court had jurisdiction under 29 U.S.C. § 633a(c) and 28 U.S.C. § 1331.

> reason was the employee's age, race, sex, religion, or some other protected characteristic, either directly through the employer's statements or actions regarding the plaintiff or indirectly through evidence of the employer's treatment of other members of the protected class, it is impossible for an employee who challenges the decisions as discriminatory to survive a motion for summary judgment.

(App. 21a-22a).

The District Court believed that any contrary holding "would misdirect the court's energies from an inquiry into possible discrimination to a review of the wisdom of the employer's hiring practices." (App. 22a).

Turning to the evidence, the District Court said Ms. Skelton's case rested on the difference in age between her and Mr. Yates "supported only by the hope that the defendant's proffered reasons for its choice will be disbelieved." (App. 23a). At no point in its opinion did the District Court mention that "the defendant's proffered reasons" contradicted the sworn reasons stated in its interrogatory answer, or that the selecting official repeatedly had confirmed this answer in his deposition.

The Court of Appeals summarily affirmed the District Court, "for the reasons stated" in the District Court's opinion (App. 1a).

REASONS FOR GRANTING THE WRIT

I.

SINCE THE COURT HAS GRANTED CERTIORARI IN *HARBISON-WALKER REFRACTORIES V. BRIECK,* NO. 87-271, THE COURT SHOULD GRANT THE WRIT IN THIS CASE.

A. This case presents the same basic question of law as *Harbison-Walker Refractories,* but more clearly, with stronger evidence.

In *Harbison-Walker Refractories,* the employer challenges a decision of the United States Court of Appeals for the Third Circuit which followed that court's *en banc* decision in *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 899 (3d Cir.1987) (*en banc*). In that case, the Third Circuit held:

> [T]o meet its burden on summary judgment, the defendant employer must show that the plaintiff will be unable to introduce . . . evidence . . . showing that the proffered reason is subject to factual dispute.
>
> The issue of the defendant's intent . . . is clearly a factual question . . . . Thus, by pointing to evidence which calls into question the defendant's intent, the plaintiff raises an issue of material fact which, if genuine, is sufficient to preclude summary judgment.
>
> A defendant which is less than honest in proffering its reason . . . risks an unnecessary age discrimination verdict . . . . If the plaintiff convinces the trier of fact that the employer did

> not act for its proffered reason, then the employer's decision remains unexplained and the inferences from the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent.

814 F.2d 899.

The employer in *Harbison-Walker Refractories* argues an employee must "do more" than show the employer's proffered explanations "were not its true reasons." According to the employer, Mr. Brieck "failed completely to forge any link between the challenged decision and age discrimination," because

> He pointed to no documents or oral remarks suggesting that the Company harbored animus toward older workers, no evidence that the Company failed to comply with corporate procedures or applied them in a discriminatory manner, and no statistics relevant to or probative of age discrimination.

Harbison-Walker Refractories (Pet. Br. at 17-18).

The District Court's decision in Ms. Skelton's case reflects the same reasoning (App. 21a-22a). Both cases present the same question of law — may an employee defeat summary judgment by evidence the employer's proffered reason is "unworthy of credence," as this Court held in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)?

The employer's argument in *Harbison-Walker Refractories* and the reasoning of the District Court in Ms. Skelton's case both present frontal challenges to *Burdine*, but the employer's brief in *Harbison-Walker Refractories* also presents an argument which

appears to accept *Burdine*. The employer's brief argues "*Burdine's* 'unworthy of credence' language requires more" than "evidence that merely casts doubt on the *wisdom* of the employer's stated reason." *Harbison-Walker Refractories* (Pet. Br. at 17, emphasis added). The employer then argues Mr. Brieck impugns only the employer's wisdom. *Id.* This argument thus accepts the legal sufficiency of evidence challenging "the *credibility* of the Company's stated reasons," *Id.* at 16-17 (emphasis added), but says evidence disputing wisdom is not evidence impeaching credibility.

This argument, even if correct,[2] is inapplicable to Ms. Skelton's case. Unlike Mr. Brieck, Ms. Skelton has presented direct evidence of incredibility — employer self-contradiction. This contradiction raises the question of truth unclouded by the issue of wisdom. Self-contradiction is classic evidence of incredibility; thus, Ms. Skelton's case is stronger than Mr. Brieck's and it presents clearly the question whether *Burdine* should be followed or rejected.

B. The agency's position in this case is contrary to that of the United States in *Harbison-Walker Refractories*.

The *amicus curiae* brief of the United States in *Harbison-Walker Refractories* supports the employee in that case and rejects the agency's position in this case:

> Petitioner . . . assert[s] that a plaintiff who has established a prima facie case in an ADEA action may rebut an employee's proffered, non-

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2. We would suggest this argument be narrowed considerably before it is accepted. If an employer's proffered reason is so "unwise" as to be ludicrous, for example, an inference of incredibility arises simply from the employer otherwise appearing intelligent and rational.

> discriminatory explanation of its actions only by offering evidence that *itself* directly tends to establish discrimination; petitioner contends that it is not enough for the plaintiff to show that the employer's stated explanation is unbelievable. This argument, however, is flatly inconsistent with *Burdine's* conclusion that pretext may be established by showing that the "employer's proffered explanation is unworthy of credence." More fundamentally, petitioner's analysis cannot be squared with the logic of the *McDonnell Douglas* [*Corp. v. Green*, 411 U.S. 792 (1973)] framework. Evidence establishing a prima facie case, if unrebutted by the defendant, entitles the plaintiff to summary judgment; if the plaintiff can show that the defendant's proffered explanation is unbelievable, he should be left, at the very least, in the same position that he would have been in had his prima facie case not been rebutted in the first place. Indeed, a showing of pretext should, if anything, strengthen the plaintiff's case, since a defendant who offers an unbelievable response to an accusation of discrimination is likely to have something to hide.

Harbison-Walker Refractories (Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae* Supporting Respondent at 6).

In *Harbison-Walker Refractories* the United States argues plaintiff presented sufficient evidence to preclude summary judgment because the employer's proffered reason for selecting another employee was his more diverse skills, yet plaintiff presented evidence the selected employee spent little time using skills plaintiff did not possess. A genuine issue whether "more diverse skills"

were needed for the job, argues the United States, implies a genuine issue whether the employer hired the selectee for that reason. *Id.* at 10-11, 17-18.

This analysis requires reversal in Ms. Skelton's case. Here the agency first proffered "strong interpersonal skills" and "ability to deal with all segments of the community" as the reason for selecting Mr. Yates. The record developed during discovery then revealed Ms. Skelton's application, not Mr. Yates', showed these skills. Thus, a stronger inference of incredibility than that in *Harbison-Walker Refractories* was created.

Then the agency's tell-tale shift in position occurred, this self-contradiction adding classic, direct evidence of incredibility. The agency in this case belatedly asserted that performance appraisals in unrelated jobs were more important to the selecting official than years of experience in the precise position in question, and that this was the "real" reason for selecting Mr. Yates — the prior "real" reason notwithstanding. The selecting official, however, who had sworn to the first reason, also had sworn he had scant recollection of even having seen the performance appraisals.

Evidence of incredibility abounds in this case, and the decisions below cannot be reconciled with the reasoning of the United States in *Harbison-Walker Refractories.* Certiorari should be granted here, as it was in *Harbison-Walker Refractories.*

II.

THE DECISION BELOW IS CONTRARY TO *TEXAS DEPT. OF COMMUNITY AFFAIRS V. BURDINE*, WHICH SHOULD BE REAFFIRMED, SINCE A MINORITY OF CIRCUITS RECENTLY HAS DEPARTED FROM ITS TEACHING.

The decision below is contrary to this Court's clear statement in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981):

> The plaintiff . . . must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision; . . . She may succeed in this . . . by showing that the employer's proffered explanation is unworthy of credence.

450 U.S. at 256.

In *Burdine* the Court also held that the discrediting of the employer's proffered reason might be accomplished solely through cross-examination taken together with the inference of discrimination which can be drawn from the employee's *prima facie* case:

> [T]he plaintiff's initial evidence [establishing a *prima facie* case] . . . and inference properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. *Indeed, there may be some cases where the plaintifff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.*

450 U.S. 255 n. 10 (emphasis added).

Here, Ms. Skelton presented far more. She presented direct evidence of incredibility, the agency's self-contradiction, yet the courts below granted the agency summary judgment, without mentioning the above-quoted passages from *Burdine*.

Other lower courts have not been so unmindful of *Burdine's* teaching. *Chippolini, supra; Tye v. Polaris Joint Voc. Sch. Distr. Bd. of Educ.*, 811 F.2d 315, 319-320 (6th Cir. 1987) ("the plaintiff may indirectly prove intentional discrimination by showing that the defendants' justifications are untrue"); *Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 644 (11th Cir. 1987) (summary judgment for employer reversed; "there are material issues of fact as to whether Lockheed's stated reason for [plaintiffs'] dismissal is worthy of credence"). Nonetheless, the Seventh Circuit's opinion in *Benzies v. Illinois Department of Mental Health and Developmental Disabilities*, 810 F.2d 146, 148 (7th Cir. 1987), and the First Circuit's opinion in *Dea v. Look*, 810 F.2d 12 (1st Cir. 1987), depart from *Burdine* in the same way as the District Court opinion in the instant case. The Court therefore should grant certiorari to reaffirm *Burdine's* validity.

The *Burdine* holding is sound. Where an employee establishes a *prima facie* case of discrimination against an employer, the employer should not be allowed to defeat the case by proffering "less than honest" explanations. *Chipollini*, 814 F.2d 899. How could the law be to the contrary? What principle of justice would reward litigants for untrue explanations of their conduct?

When an employer's proffered reason is shown to be untrue, the employer's action stands unexplained, and the district court should assume the true reason was discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("when all legitimate reasons for rejecting an applicant have been

eliminated, . . . it is more likely than not the employer . . . based his decision on an impermissible consideration").

Contrary to the District Court's opinion in this case, adjudicating the credibility of an employer's proffered reason does not "misdirect the court's energies from an inquiry into possible discrimination to a review of the wisdom of the employer's hiring practices." (App. 22a). The truth, not the wisdom, of the proffered reason is the relevant issue.

This inquiry involves no misdirected energy. It is a most economical way to resolve discrimination cases where direct evidence of discriminatory intent is absent. It requires the defendant to state what her or his intent was, then affords the plaintiff opportunity to disprove that statement. Under the district court's approach, a plaintiff having no direct evidence of discriminatory intent would be required to abandon the case or pursue the nearly endless task of negating each and every nonactionable state of mind. *See Benzies.* The latter option would indeed involve considerable misdirection of judicial energy. The holding below should be rejected.

CONCLUSION

For these reasons a writ of certiorari should issue to review the order of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5353 September Term, 1987

C.A. No. 85-1321

Rita M. Skelton,

Appellant

v.

ACTION, et al.

BEFORE: Starr, D.H. Ginsburg, and Sentelle, Circuit Judges

O R D E R

Upon consideration of appellees' motion for summary affirmance, the response thereto and the reply, it is

ORDERED by the court that appellees' motion for summary affirmance be granted for the reasons stated in the Memorandum Opinion of the district court, filed August 3, 1987. It is

FURTHER ORDERED that appellant's

motion for remand and consolidation with related case or amendment of complaint or both, be dismissed as moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

[Entered May 12, 1988]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RITA M. SKELTON,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 85-1321
	)	
ACTION, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

Barrington D. Parker, Senior District Judge:

Plaintiff brings this suit under the Age Discrimination in Employment Act, 29 U.S.C. § 633a ("ADEA"), charging that she was denied promotional opportunities by her employer, the ACTION agency,[1] and was otherwise unlawfully

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1 ACTION is an independent federal agency established within the executive branch to assist in the provision of services to the poor, disadvantaged, and elderly.

discriminated against because of her age.[2] In her complaint, as subsequently amended, she alleged that ACTION failed to promote her to the position of Maryland State Program Director solely on the basis of her age and, in addition, systematically discriminates against older persons in filling positions at the GS-13 and GS-14 level, as well as favoring active members of the Republican Party. Plaintiff also charged ACTION with improperly designating certain GS-13 and GS-14 positions as noncompetitive and with failing to give due con-

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2 The ADEA provides in relevant part that

> "[all] personnel actions affecting employees or applicants for employment who are at least 40 years of age...in executive agencies...shall be made free from any discrimination based on age."

29 U.S.C. § 633a(a).

sideration to in-house applicants such as herself. After an initial round of pretrial motions, the Court dismissed all but the claim that plaintiff's non-selection for the Maryland State Program Director position was improper. See Orders of March 24 and June 18, 1986.

Subsequent to the filing of pretrial briefs, defendants moved for summary judgment on the one remaining claim. They argue that the undisputed facts of record demonstrate that age played no part in plaintiff's nonselection and that, as is apparent from plaintiff's pretrial brief, she is not prepared to present at trial any evidence of discriminatory animus on the part of her employer. Under such circumstances, argue defendants, a trial would be a pointless exercise, as they are entitled to judg-

ment as a matter of law. The Court agrees.

Defendants have offered a legitimate reason for plaintiff's nonselection; the selecting official believed that another individual was better qualified. Once such a reason is put forward, it falls to plaintiff to demonstrate -- by either direct or indirect evidence -- that age was a determining factor in her nonselection. This she has utterly failed to do. Instead, counsel spent his energy during oral argument attempting to demonstrate that the selectee was not in fact better qualified. What counsel fails to realize, however, is that, once defendants come forward with a legitimate reason for not selecting plaintiff, it falls to plaintiff to ad-

dress anew[3] the issue of discrimination, not to quibble about the candidates' relative qualifications. Not only is it not within the Court's province to second-guess an employer's choice of candidates, but even if plaintiff were to prove that she were better qualified, that -- without more -- would not indicate that she failed to obtain the desired position because of her age. All that such evidence would show, absent some other evidence of actual discrimination, is that defendants made a faulty selection decision. Yet that is not the kind of employee grievance that the Court is directed by Congress to

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[3] In other words, plaintiff must do more than to fall back on her prima facie cases, which by itself only shows that she is older than the person who was selected for the position in question.

remedy. Unless the employer's choice of candidates can be shown to have been tainted by unlawful discrimination, it must be allowed to stand, no matter how unwise it may seem to the disappointed applicant.

For the reasons set forth below, defendants' motion for summary judgment is granted.

I.

BACKGROUND FACTS

The facts material to a resolution of this case are not in dispute.[4] On November 20, 1984, ACTION announced a vacancy for the position of Maryland

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4 Plaintiff does dispute the statements made in paragraphs 35-41 and 43 of defendants' Statement of Material Facts as to Which There is no Genuine Issue. Yet none of the "issues" raised concern facts material to the outcome of the question presented to the Court, as will be discussed infra, and so are not "material."

State Program Director, GM-301-13. At the time plaintiff applied for that position, she was working at the National Center for Municipal Development, on detail from ACTION. Immediately before that assignment, which commenced in April 1984, plaintiff had been a GS-13 program analyst at ACTION. Competing with her for the Maryland position was Jerry Yates, who ultimately secured the appointment. For approximately two and one-half years prior to his application, Mr. Yates had worked on the staff of the Vietnam Veterans Leadership Program at ACTION, on detail from the Veterans Administration ("VA").[5] As of January 1983, he was a GS-14. At the

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[5] Shortly before he filed his application, Mr. Yates returned to the Veterans Administration, where he worked until taking up his new position with ACTION.

time of his application, he was 38 years old; plaintiff was 57.

With his standard application form SF-171, Mr. Yates submitted two performance appraisals prepared by former supervisors at ACTION, together with an Applicant Appraisal Form for Merit Promotion completed by his then supervisor at the VA. Plaintiff also submitted an SF-171 and an Applicant Appraisal Form, together with several letters of appreciation. A comparison of the Appraisal Forms submitted by the two applicants reveals that Mr. Yates was consistently rated superior to plaintiff in all relevant areas of concern.

The selection of a candidate to fill the Maryland position was made by Mr. Daniel Bonner, the Associate Director for Domestic and Antipoverty Opera-

tions at ACTION. In making his choice for the position, Mr. Bonner was not only impressed with the superior performance appraisals submitted on behalf of Mr. Yates, but also with favorable reports about Yates from his ACTION supervisors who, in turn, worked under Bonner. See Deposition of Daniel F. Bonner (June 19, 1986) at 47-49, 59-62, 66-67 ("Bonner depo."); Deposition of Jerry E. Yates (June 19, 1986) at 56-59 ("Yates depo."). These individuals reported to Bonner on the progress being made in the Vietnam Veterans Leadership Program ("VVLP"), in which Mr. Yates was working.[6] In this way, Mr. Bonner became at least indirectly familiar with Mr.

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[6] Mr. Yates, who had a strong interest in veterans' affairs, took the initiative in securing a position with the VVLP at its inception. Yates depo. at 22-41.

Yates's work during Yates's detail at ACTION. It was generally reported to him that Yates was an outstanding employee.

In contrast, Mr. Bonner was not especially impressed with the application package submitted by plaintiff, which contained an Appraisal Form indicating that, on the whole, she was only somewhat above average. See Bonner depo. at 75-77. Moreover, while Mr. Yates's application package included two performance appraisals from former supervisors at ACTION, Declaration of Daniel F. Bonner ¶ 7, plaintiff had only several letters of appreciation in addition to her Applicant Appraisal Form. Id. ¶¶ 7, 10. Her Applicant Appraisal Form rated her only average in certain areas deemed critical and, as to certain other

factors, rated her only "above average" and then only on the basis of perceived potential rather than actual performance. Id. ¶ 10. Mr. Bonner did not attach much weight to the letters of appreciation, as they appeared to be either remote in time, from persons other than plaintiff's supervisors, or not addressed to the skills or qualifications in question. Id. While plaintiff had on various occasions served as State Director in other parts of the country, Mr. Bonner found nothing in her application package to indicate that she had been a successful Director. Id. As was made clear in oral argument, plaintiff could have submitted performance appraisals from persons who evaluated her work as State Director, but did not. The absence of such appraisals from her

application package is sufficient to have entitled Mr. Bonner to conclude that plaintiff had not in fact been especially successful in those positions.[7] For that reason, Mr. Bonner did not feel it necessary to contact plaintiff's supervisors, id. at 81-82, although he did speak with the persons to whom Mr. Yates directly reported. In short, Mr. Bonner considered Mr. Yates to be the superior candidate and so

---

[7] Of course, the absence of supervisor appraisals from plaintiff's application, even if it had been the fault of the selecting official or some other personnel specialist at ACTION, could in no way bolster plaintiff's case. The key question is whether the selecting official believed -- on the basis of the information before him -- that the person selected was better qualified, or whether he declined to select plaintiff because of her age. It is irrelevant that some other information not brought to his attention might have caused him to choose plaintiff rather than another candidate; the "correctness" of the employer's choice is not at issue here.

offered him the position rather than plaintiff.

II.

ANALYSIS

A. Applicable Legal Principles

To withstand a motion for summary judgment, the nonmoving party must demonstrate that there exists a genuine dispute as to one or more facts material to the outcome of the litigation. Anderson v. Liberty Lobby, Inc., ____ U.S. ____, 106 S. Ct. 2505, 2510 (1986); Fed. R. Civ. P. 56(c). Moreover, as the Supreme Court stressed in Liberty Lobby, the dispute must be genuine, and it must concern a material fact. Id. "Factual disputes that are irrelevant or unnecessary will not be counted." Id.

Facts that are "material" to the outcome of a case are those that the

governing substantive law recognizes as relevant. ____ U.S. ____, 106 S. Ct. at 2510. In age discrimination cases, they are facts speaking to the element of the analytical framework laid down in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973), a Title VII case. As modified for application in ADEA cases, the McDonnell analysis involves three steps. First, a plaintiff must make out a prima facie case of age discrimination by showing that he is a member of the statutorily protected age group, that he was qualified for the position but not hired or promoted, and that a person outside the protected age group was selected instead. Cuddy v. Carmen, 762 F.2d 119, 122 (D.C. Cir. 1985). Once a plaintiff has accomplished this, the burden then shifts to

the defendant to rebut the resulting presumption of discrimination. Id. To do so, a defendant must produce evidence "that plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981), quoted in Cuddy, 762 F.2d at 122. If the defendant is successful in that undertaking, it then falls to the plaintiff to prove his case "either indirectly by showing that the reason proffered by the defendant was in fact a pretext or directly by showing that it was more likely than not that the defendant was actually motivated by discrimination." Cuddy, 762 F.2d at 123. In other words, the plaintiff ultimately bears the burden of proving that age was a "determining factor" in

his nonselection, id., and that "but for" the employer's discriminatory motive, he would have been selected for the position in question. Krodel v.Young, 748 F.2d 701, 706 (D.C.Cir. 1984), cert. denied, ____ U.S. ____, 106 S. Ct. 62 (1985).

A "genuine" issue concerning a material fact exists "if the evidence is such that [the factfinder] could [enter judgment] for the nonmoving party." Liberty Lobby, ____ U.S., 106 S. Ct. at 2510.

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Id. at 2511. Nevertheless, it is insufficient, in opposing a motion for sum-

mary judgment, for the nonmoving party to rely upon mere allegations or upon the hope that, at trial, evidence put on by the moving party may simply be disbelieved. Id. at 2514. Rather, "the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment[,]... even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery." Id.

In an age discrimination case, the Court's teachings mean that, once the defendant has moved for summary judgment by producing evidence that there existed legitimate, nondiscriminatory reasons for the plaintiff's nonselection, the plaintiff must then demonstrate the existence of material facts indicating

that the reasons proferred by the defendant are merely pretextual or that the defendant was in fact animated by a discriminatory motive. Failure to produce such evidence at the summary judgment stage entitles the defendant to judgment. See, e.g., Box v. A & P Tea Co., 772 F.2d 1372, 1378 (7th Cir. 1985), cert. denied, ____ U.S. ____, 106 S. Ct. 3311 (1986); Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983); Smith v. Chamber of Commerce, 645 F.Supp. 604, 607, 609 (D.D.C. 1986), appeal filed, No. 86-5659 (D.C. Cir. Oct. 20, 1986); Snyder v. Washington Hospital Center, 36 Fair Empl. Prac. Cas. (BNA) 445, 448-49 (D.D.C. 1984). Moreover, as the Court emphasized in Liberty Lobby, it is not enough for the plaintiff to hope that the factfinder might simply disbelieve

the reasons proffered by the defendant; it is necessary for the plaintiff to put on some evidence, beyond the mere age differential between himself and the selectee, demonstrating that age played a role in the particular employment decision. Smith, 645 F. Supp. at 609-10 & n.4; Snyder, 36 Fair Empl. Prac. Cas. at 448; see also, Cuddy, 762 F.2d at 123. As the court in Snyder noted, even if a plaintiff were successful in discrediting the defendant's reasons for selecting another, younger candidate, at least to the extent of showing that those reasons were misjudged or ill-considered, it does not follow that the plaintiff will have defeated the defendant's motion. 36 Fair Empl. Prac. Cas. at 448. As the court reasoned:

> [e]vidence that the reasons

> given by an employer for an employment decision were not the "real" ones does not prove age discrimination; rather, it only proves that some other reason motivated the employer. Absent some evidence that the real reason was the employee's age, race, sex, religion, or some other protected characteristic, either directly through the employer's statements or actions regarding the plaintiff or indirectly through evidence of the employer's treatment of other members of the protected class, it is impossible for an employee who challenges the decisions as discriminatory to survive a motion for summary judgment.

Id. A contrary rule would only misdirect the court's energies from an inquiry into possible discrimination to a review of the wisdom of the employer's hiring practices.

In short, while a plaintiff need not put on direct evidence of discrimination, U.S. Postal Serv. Bd. of Gover-

nors v. Aikens, 460 U.S. 711, 717 (1983); Burdine, 450 U.S. at 255 n.10; King v. Palmer, 778 F.2d 878, 881-82 (D.C. Cir.) reh. en banc denied, 778 F.2d 883 (1985); Snyder, 36 Fair Empl. Prac. Cas. at 448 n.3, she must put on some evidence upon which a factfinder could reasonably find in his favor. Where, as here, a plaintiff opposing a motion for summary judgment relies upon mere allegations of discrimination, based only upon the age difference between the candidates and supported only by the hope that the defendant's proffered reasons for its choice will be disbelieved, there is no genuine issue of fact requiring a trial. In such cases, the defendant is entitled to summary judgment.

B. Existence of Genuine Issues of Material Fact

An application of the principles of law outlined above to the instant case clearly supports a determination that summary judgment should be entered for defendants. Not only has plaintiff failed to demonstrate the existence of issues of fact material to the outcome of her suit, but she has not even shown that the issues she has raised are "genuine."

Plaintiff proceeds from the premise that it is sufficient for her, in opposing defendants' motion, to pick at the reasons proffered by defendants for her nonselection, in the hope that an accumulation of trivial conflicts will amount to an issue of material fact. Yet even were there conflicts in the record to which she points truly indicative of disputed issues of fact, she cannot at-

tain her goal, for even if she could demonstrate that Mr. Bonner, the selecting official, was not nearly as impressed with Mr. Yates as he claims, and that in fact he did not carefully review Mr. Yates's application, she would still fall far short of proving that age was a "determining factor" or had anything to do with Yates's selection for the position. See Cuddy, 762 F.2d at 123; Snyder, 36 Fair Empl. Prac. Cas. at 448. Yet as plaintiff indicates in her pretrial brief, she is not prepared to put on any evidence -- direct or indirect -- of actual age discrimination. For that reason alone, summary judgment for defendants is warranted, since it is clear at this point that plaintiff would not avail herself of the opportunity at trial to present evidence -- as she must

-- that the reasons proffered by defendants for her nonselection are merely pretextual.

Moreover, even if plaintiff could survive defendants' motion by demonstrating nothing but that defendants' reasons supporting the selection of Mr. Yates are weak, she would fail to make such a showing here. It is not enough for her to produce a mere "scintilla" of evidence to create a genuine issue of fact; there must be sufficient evidence of record to support a finding that the reasons proffered by defendant are pretextual. See Liberty Lobby, ____ U.S. ____, 106 S. Ct. at 2512. All plaintiff has done is to find fault with Mr. Bonner's memory; she cannot seriously believe that she has discredited his testimony that he indeed believed that Mr. Yates was the superior candi-

date.[8] For instance, she faults Mr. Bonner for misremembering -- or for mistakenly beliving -- that Mr. Yates worked at ACTION for the VVLP until the time that he became the Maryland program director. In fact, as plaintiff eagerly points out, Mr. Yates had left ACTION to return to the VA a couple of months prior to submitting his application for the Maryland position. In a similar vein, plaintiff takes Mr. Bonner to task for not having a specific memory of having reviewed Mr. Yates's Appraisal Form from the VA and for being in error as to which of Yate's supervisors had signed it. None of these putative "conflicts" even begins to cast serious doubt upon Mr. Bonner's unequivocal

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[8] Of course, whether Mr. Yates actually was the superior candidate is irrelevant.

testimony that he considered Mr. Yates to be the more desirable applicant. Indeed, the veracity of Mr. Bonner's testimony is directly supported by the documentary evidence of record, which indisputably demonstrates that anyone looking at the two candidates' respective application package might have reasonably felt that Yates's was superior, containing as it did a number of "excellent" or "superior" ratings, in contrast to plaintiff's corresponding ratings of "average" or "satisfactory." In short, if the issue here were the sincerity of Mr. Bonner's satisfaction with Mr. Yates, then plaintiff would still have failed to demonstrate that summary judgment is inappropriate.

Of course, as stated previously, the issue is not the selecting offi-

cial's happiness with Mr. Yates; it is the possibility that the nonselection of plaintiff might have been motivated by age discrimination. Yet plaintiff has not presented -- and is not prepared to present -- any evidence from which a factfinder might conclude that the reasons proffered by defendants for her non-selection are sham and that, in reality, she was the victim of prohibited bias.[9]

This case presents no genuine issues of material fact and, on the undisputed facts, defendants are entitled to judgment as a matter of law. Indeed, after careful consideration and review

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[9] This is not a case like Donnellon v. Fruehauf, 794 F.2d 598 (11th Cir.), reh. en banc denied, 800 F.2d 267 (1986), ___ cited by plaintiff. In Donnellon, the plaintiff had produced affirmative -- and direct -- evidence of discrimination. See 794 F.2d at 601-02.

of the record, the Court questions whether plaintiff's counsel should have ever filed and pursued this proceeding. Defendants' motion for summary judgment is granted. An appropriate Order will be entered.

Entered: August 3, 1987

Barrington D. Parker
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RITA M. SKELTON,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 85-1321
	)	
ACTION, et al.	)	
	)	
Defendants.	)	
	)	

ORDER

In accordance with the Memorandum Opinion entered herewith, it is this 3rd day of August, 1987,

ORDERED

That defendants' motion for summary judgment is granted; and

That judgment is accordingly entered for defendants and the complaint of Rita M. Skelton is dismissed with prejudice.

Barrington D. Parker
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5353 September Term, 1987

USDC C.A. 85-1321

Rita M. Skelton,

Appellant

v.

Action, et al.

BEFORE: Starr, D.H. Ginsburg, and Sentelle, Circuit Judges

O R D E R

Upon consideration of Appellant's Petition for Rehearing, filed June 23, 1988, it is

ORDERED, by the Court, that the petition is denied.

After the panel granted appellee's motion for summary affirmance, thus wholly disposing of the appeal in No. 87-5353, there was nothing further to

rule upon. Any pending motions were, as a procedural matter, necessarily moot. Beyond that, no substantive inferences should be drawn. The res judicata question pending in C.A. No. 87-1822 is not before this court; that matter is before the district court and is entirely within that court's sound discretion to resolve.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY:
Robert A. Bonner
Deputy Clerk

[Entered August 12, 1988]

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5353 September Term, 1987

USDC C.A. No. 85-01321

Rita M. Skelton,

Appellant

v.

Action, et al

BEFORE: Wald, Chief Judge, Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges

O R D E R

Appellant's Suggestion for Rehearing En Banc has been circulated to the Full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY:
Robert A. Bonner
Deputy Clerk

[Entered August 12, 1988]

Supreme Court, U.S.
FILED
FEB 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-907

In the Supreme Court of the United States

OCTOBER TERM, 1988

RITA M. SKELTON, PETITIONER

v.

ACTION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-907

RITA M. SKELTON, PETITIONER

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ACTION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that ACTION, a federal agency, violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, by selecting a younger candidate for a position within the agency.

1. In 1984, ACTION published a notice of its intent to hire someone as its Maryland State Program Director. Petitioner applied for the position. At that time, petitioner was 57 years old and employed by ACTION, although she was on detail to the National Center for Municipal Development. Petitioner did not receive the job. ACTION selected Jerry Yates, a 38-year-old member on the staff of ACTION's Vietnam Veterans Leadership Program. Petitioner then filed this action alleging that ACTION violated the ADEA by rejecting her application on the basis of her age. Pet. App. 8a-15a.

The district court granted ACTION's motion for summary judgment (Pet. App. 3a-30a). The court reasoned

that, although petitioner had made out a *prima facie* case of discrimination, ACTION had rebutted any presumption of discrimination by proving a legitimate reason for its employment decision—*i.e.*, the selecting official, Daniel Bonner, thought that Jerry Yates was better qualified (Pet. App. 6a). The court reviewed the evidence and found that petitioner "has utterly failed" to show "—by either direct or indirect evidence—that age was a determining factor in her nonselection" (*ibid.*).

The district court noted that petitioner provided no evidence to show that ACTION's stated reason for its employment decision was a pretext. The court observed: "All [petitioner] has done is to find fault with Mr. Bonner's memory; she cannot seriously believe that she has discredited his testimony that he indeed believed that Mr. Yates was the superior candidate" (Pet. App. 26a). Accordingly, the court concluded that there is no evidence that ACTION's explanation was a "sham and that, in reality, [petitioner] was the victim of prohibited bias" (*id.* at 29a). The court of appeals affirmed "for the reasons stated in the Memorandum Opinion of the district court" (*id.* at 1a).

2. The decision of the court of appeals is correct and it does not conflict with the decision of any other court. Thus, no further review is warranted.

a. The decision below follows the three-step framework for resolving discrimination claims developed by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). That familiar framework provides:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in

> proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Burdine, 450 U.S. at 252-253 (citation omitted).

Here, the district court found that petitioner made out a *prima facie* case and that ACTION "offered a legitimate reason for [petitioner's] non-selection; the selecting official believed that another individual was more qualified" (Pet. App. 6a). Accordingly, the court, in ruling on ACTION's motion for summary judgment, asked whether petitioner had offered any evidence showing that the reason given by ACTION was a pretext (*id.* at 25a-26a). And the court found that petitioner had provided no such evidence (*id.* at 26a-29a). Thus, the court properly entered summary judgment in favor of ACTION.

b. The question presented in the petition is whether a plaintiff who establishes a *prima facie* case may defeat a defendant's motion for summary judgment by showing that the defendant's explanation for its employment decision is "unworthy of credence" (Pet. i). As we explained in our brief in *Harbison-Walker Refractories* v. *Brieck*, cert. dismissed, No. 87-271 (Dec. 12, 1988), the answer to that question is "yes."* But the question posed by petitioner is not presented in this case.

The district court unequivocally found that petitioner had submitted no evidence discrediting ACTION's explanation. The court stated that petitioner "has not

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* We have supplied a copy of our brief in *Harbison-Walker* to petitioner.

presented—and is not prepared to present—any evidence from which a factfinder might conclude that the reasons proferred by [ACTION] for her non-selection are a sham and that, in reality, she was the victim of prohibited bias" (Pet. App. 29a). The court further found that ACTION's reason for denying petitioner's application—the superior qualifications of Mr. Yates—was supported by an objective view of the documentary evidence (*id.* at 28a). Thus, this case does not present the question whether a plaintiff in a discrimination case may withstand a summary-judgment motion by simply showing that the defendant's explanation is false.

To be sure, the district court quoted (Pet. App. 21a) a passage from *Snyder* v. *Washington Hospital Center*, 36 Fair Empl. Prac. Cas. (BNA) 445 (D.D.C. 1984), which seems to hold that a plaintiff must have more evidence of discrimination than proof that the defendant's proffered explanation is untrue. The district court's quotation of *Snyder*, however, is simply dicta in light of petitioner's failure to present any evidence discrediting ACTION's explanation. And in any event, the district court cited *Snyder* for the proposition that "even if a plaintiff were successful in discrediting the defendant's reasons for selecting another, younger candidate, *at least to the extent of showing that those reasons were misjudged or ill-considered,* it does not follow that the plaintiff will have defeated the defendant's motion" (Pet. App. 21a (emphasis added)). Hence, the district court's citation of *Snyder* may well stand only for the unexceptional point that a plaintiff cannot avoid summary judgment by attacking the wisdom of the employer's hiring decision. See, *e.g.*, *Kephart* v. *Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981) (ADEA may not be used as vehicle for judicial review of business decisions).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WILLIAM C. BRYSON
Acting Solicitor General

FEBRUARY 1989

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